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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 510

SANTO R. SGARLATO, JR.,
Petitioner,

SOLOMON A. KLEIN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Petitioner seeks review of an order of the New York Court of Appeals, entered June 14, 1968, which unanimously affirmed an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered February 14, 1967, suspending petitioner from the practice of law for a period of two years for professional misconduct.*

Opinions Below

The memorandum opinion of the Appellate Division (Appendix of Petition) is reported in 27 A D 2d 738. The order of the Court of Appeals affirming the order of the Court below without opinion is reported in 22 N Y 2d 813. The

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* Petitioner's application for a stay of the suspension order was denied by Mr. Justice Harlan on August 17, 1968, with the following notation: "Denied, because I believe that there is no reasonable likelihood that certiorari will be granted." A stay was thereafter granted by Mr. Justice Black pending timely filing and disposition of a petition for a writ of certiorari.

amended remittitur of the Court of Appeals has not yet been reported and is printed in the appendix annexed hereto.

Jurisdiction

Petitioner invokes the jurisdiction of this Court under Title 28 U.S.C. 1257 (3).

Statutes Involved

The pertinent constitutional and statutory provisions are set forth in the Appendix to this brief. They are: (1) the Fifth and Fourteenth Amendments to the United States Constitution, (2) section 90, subd. 2, of the New York Judiciary Law, (3) the Rules of the New York Appellate Division regulating the conduct of attorneys who engage in personal injury practice on a contingent fee basis, (4) section 474 of the New York Judiciary Law, (5) Article 80 of the New York Civil Practice Act, and (6) subds. 1, 3, 7 and 9 of Rule 294 of the New York Rules of Civil Practice.

Statement of Case

On November 5, 1959, petitioner appeared at an Additional Special Term of the Supreme Court of New York in a preliminary investigation into the conduct of attorneys engaged in contingent-fee negligence practice. The investigation was ordered by the Appellate Division of the Second Judicial Department which is charged by statute with the duty to supervise the professional conduct of attorneys (New York Judiciary Law, Sec. 90 Subdv. 2) (A3). When called as a witness, petitioner refused to answer any ques-

tions claiming Fifth Amendment privilege against self-incrimination. He was therefore excused (Exh. 16, s.m. 26500-26510). A year and a half later, this Court rendered the decision in *Cohen* v. *Hurley,* 366 U.S. 117. Thereupon, petitioner spoke to Mr. Hurley, Counsel of the Judicial Inquiry, and requested an opportunity to appear and testify. Petitioner's testimony at the preliminary investigation shows:

> "Q. When did the decision of the Supreme Court first become known to you in the Cohen case? When did you first learn of it? A. Gee, I don't remember.
>
> Q. Well, when you learned of it, what steps did you take with regard to your position before the Inquiry in that you had also pleaded the Fifth Amendment?
>
> Mr. Panken: If your Honor pleases, may I ask what the purpose of these questions is?
>
> The Court: The purpose is this. In a number of instances attorneys who had availed themselves of the privilege which they felt at the time they had a perfect right to do, after they learned of the Cohen decision and after that was finalized, they telephoned or wrote to the Inquiry and requested leave to come back. Evidently Mr. Sgarlato did not do that, and the purpose of these questions is to ascertain why he didn't. That's all.
>
> The Witness: Well, I did do something. I came in and I saw Mr. Hurley personally.
>
> Q. Could you fix a date when you came in to see Mr. Hurley? A. No, I spoke to him and I told him him that I'd be glad to come in and testify if he would tell me exactly what he wanted, not to just go flying all over the place on any kind of file. If they told me what they were interested in I'd be glad to answer whatever questions he asked or whatever files they were interested in.

Q. Is this before you received a letter, telephone call or a subpoena when you contacted Mr. Hurley? A. Yes." (Exh. 16, s.m. 37520-37521)*

The Judicial Inquiry acceded to petitioner's request. By letter of October 24, 1961, referred to in the petition (p. 3), petitioner was asked to appear at the Additional Special Term on November 2, 1961. He was asked to bring with him his financial records "pertinent to your practice of law" as described in a subpoena duces tecum, petitioner was also advised that he would "subsequently be asked to produce certain of the legal files relating to cases processed by yourself".

On November 2, 1961, petitioner appeared at the Additional Special Term accompanied by counsel. In response to specific questions as to the position he wished to take, petitioner informed the Court that he was willing to answer any relevant questions and that he desired to withdraw his previous claim of privilege against self-incrimination. This is what the stenographic transcript at the preliminary investigation showed:

"Q. At the time of your last appearance, Mr. Sgarlato, you invoked your privilege against self-incrimination and refused to answer certain questions put to you with regard to your practice of law, is that correct? A. That's right.

Q. At that time the only ground upon which you refused to testify was on the ground that to answer certain questions would tend to incriminate you, is that correct? A. That's right.

* The petition for writ of certiorari omits any reference to the fact that petitioner had voluntarily requested to appear and answer whatever questions that would be asked if he were told exactly what was wanted.

Q. At the time that you appeared, counselor, were you represented by counsel? A. I was not.

Q. At this time do you wish to withdraw that plea? A. Yes, sir.

The Court: You are willing, counselor, now to testify to all matters deemed by the Inquiry to be material and relevant?

The Witness: Yes, your Honor.

The Court: Of course subject to my rulings as to whether or not they are.

The Witness: Yes.

Mr. Harold Panken: Subject to your Honor passing upon the materiality of them.

The Court: Yes." (Exh. 16, s.m. 35236-35237)*

Thereafter, petitioner answered all questions put to him. On five subsequent occasions ending in November, 1962, petitioner with his counsel present, gave further testimony without ever raising a single objection on any constitutional ground. Nor did petitioner make any claim of privilege with respect to receipt in evidence of any of his records (Exh. 16, s.m. 35234-35251; 37515-37597; 38704-38796; 39038-39183; 39184-39279; 39504-39541).

Petitioner was thereafter served with written charges of professional misconduct in connection with his practice of law. Petitioner filed an answer in which he admitted charge 26, namely, that he failed to maintain a separate trust account for the deposits of clients' and escrow funds, commingled said funds with his own money, such misconduct being a violation of Rule 4 of the Special Rules of the Appellate Division Regulating the Conduct of Attorneys. In

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* Here, again, the petition for writ of certiorari omits the fact of petitioner's express withdrawal of claim of privilege.

no part of his answer did petitioner raise any issue involving constitutional rights.

In response to petitioner's answer to charges which he denied, the Appellate Division designated a justice of the New York Supreme Court to herein report upon the issues raised by the pleadings, Mr. Justice Nicholas M. Pette. Accordingly, lengthy hearings were held. The hearings extended over a period of two months. At no time in the hearings held upon the charges made, did petitioner assert constitutional privilege to refuse to testify or to exclude any evidence. When a transcript of petitioner's testimony given in the preliminary investigation (Exh. 16) was offered in evidence, petitioner stated:

"I have no objection." (R 75)

The record will be searched in vain for the slightest suggestion that petitioner's consent to the introduction in evidence of the transcript of his testimony was given, as is now contended in his petition (p.4) "under threat of disbarment", implied or otherwise. Throughout the hearings, petitioner maintained his position that he was not going to claim privilege, and desired "to be frank and candid with the Appellate Division and with the Court, in view of the fact that I feel I have nothing to hide in this proceeding". (R 209).

After the hearings were closed, Mr. Justice Pette filed a report with the Appellate Division making findings of fact. Justice Pette reported that the facts supported seven charges and that in his opinion, the evidence as to the remaining charges was insufficient. Respondent moved to confirm the findings adverse to petitioner and to disaffirm findings with respect to eight charges. In response, thereto,

petitioner raised no contention that he had been deprived of constitutional rights. This was no inadvertent omission. It was intentional and in accordance with the record of the hearings held upon the charges.

It was not until the Appellate Division decided against petitioner on the merits and imposed a two-year suspension that petitioner contended that the receipt in evidence of a transcript of his testimony in the preliminary investigation was violative of his constitutional rights. This contention was initially raised upon a motion to the Appellate Division for reargument or for leave to appeal. It is most significant that no such contention was made while the motion to confirm and disaffirm the findings of Justice Pette, was sub judice before the Appellate Division, even though this Court decided *Spevack* v. *Klein,* 385 U.S. 511, a month prior to the decision and order of the Appellate Division suspending petitioner. Petitioner in support of his motion for reargument and leave to appeal, revealed that notwithstanding his cognizance of the decision of this Court in *Spevack* v. *Klein,* he withheld his present contention from the Appellate Division because of his "hope that I perhaps faced nothing more than a censure."

This revealing admission is stated in petitioner's affidavit:

> ". . . my reading of the essentially favorable report of the Referee, which had raised in me the hope that I perhaps faced nothing more than a censure, doubtless operated also to slow my own reactions of decisiveness between January 16, 1967 when Spevack was decided and February 14, 1967 when this Court decided my case."

Thus, the facts contained in the record show that at no time in the course of the disciplinary proceedings did petitioner assert any claim of privilege by reason of self-incrimination. Rather, the record shows that petitioner deliberately withdrew his claim of privilege in testifying before the preliminary investigation and continued this position throughout the hearings before Mr. Justice Pette. It is upon this record that the New York Court of Appeals affirmed without opinion and it is in this context that the recital was made in the amended remittitur of the Court of Appeals:

> "The Court of Appeals held there was no violation of Appellant's constitutional rights".

ARGUMENT

1.

The first question presented by petitioner reads as follows:

> "1. Whether the Fifth Amendment Privilege against self-incrimination, as applied to state action through the Fourteenth Amendment, forbids the use in judicial disciplinary proceedings with respect to an attorney, of inculpatory evidence obtained from the attorney by the coercive threat of disbarment if he refused to furnish the incriminating evidence."

This question is without basis in fact. The record demonstrates that the petitioner's evidence at the preliminary hearings was not given as a result of "coercive threat of disbarment if he refused to furnish the incriminating evidence".

On the contrary as shown by our statement of the case, petitioner upon learning of this Court's decision in *Cohen*

v. *Hurley,* volunteered to return and testify at the Additional Special Term and answer any questions that might be put to him (Exh. 16, s.m. 37520-37521). His request for an opportunity to return and testify was not induced by any threat whatever by the Judicial Inquiry. In making this request, petitioner admittedly told counsel for the Judicial Inquiry that he would be "glad to answer whatever questions" counsel "asked or whatever files they were interested in".

Petitioner's decision to return to the Inquiry was thus the product of a voluntary choice to withdraw his previous claim of privilege. And when he appeared with counsel at the Additional Special Term on November 2, 1961, petitioner was again given the opportunity to assert his constitutional privilege if he so desired. He was reminded that in 1959 he had invoked his privilege against self-incrimination and was specifically asked if he now wished to withdraw that plea. His response was that he wished to withdraw his claim of privilege and informed the Court that he was willing "to testify to all matters deemed by the Inquiry to be material and relevant" (Exh. 16, s.m. 35237). No threat, expressed or implied, was made that if he did not withdraw his claim of privilege and furnish relevant evidence, he would be disbarred or otherwise disciplined. Petitioner chose to withdraw his privilege with the advice of his counsel. He gave no indication that his decision to testify and produce requested records was made because of any threat of harm if he failed to do so.

And when the transcript of his testimony at the Inquiry (Exh. 16) was offered in evidence at a hearing in the disciplinary proceeding, petitioner had another opportunity to assert that his testimony given at the preliminary investi-

gation had been obtained in violation of his privilege against self-incrimination. Instead petitioner affirmatively stated that he had no objection to the introduction into evidence of his prior testimony (R. 75). Consonant with petitioner's then position that he made no claim of violation of constitutional right, he testified as a witness in the prosecution of the disciplinary proceeding without demur or objection and supplemented this testimony by testifying as his own witness.

After the filing of the report of the Justice presiding at the hearings, respondent moved to confirm and to disaffirm in part the findings of the reporting Justice. Again petitioner made no claim that any of his constitutional rights had been violated. It was not until after the Appellate Division had rendered its decision on the merits that petitioner, for the first time, raised a contention that the receipt in evidence of the transcript of his testimony previously given at the preliminary investigation violated his privilege against self-incrimination. Petitioner's reason for having raised no such constitutional issue at the hearings is most significant. In his own words he had "the hope that I perhaps faced nothing more than a censure".

Petitioner may not alter the character of the controversy actually presented for determination after losing on the merits by asserting a contention that he had deliberately refrained from making. It is in these circumstances that the Court of Appeals rejected petitioner's contention that his suspension from the practice of law was based on a violation of constitutional rights and affirmed the order of the Appellate Division unanimously without opinion.

Fully on the facts in this case, it is pertinent to quote the observation made by the New York Court of Appeals in

Matter of Zuckerman, 20 N Y 2d 430, cert. den. 390 U.S. 925, sub. nom., *Zuckerman* v. *Greason*, rehearing denied, 390 U.S. 975, at page 439:

> "They [lawyers] are not required to invoke the Fifth Amendment to the Constitution of the United States but may choose to reveal their professional conduct to the scrutiny and evaluation of the Appellate Division when its propriety is drawn in question."

Petitioner having expressly withdrawn any claim of privilege against self-incrimination and having deliberately chosen to reveal his professional conduct in the hope that he would receive "nothing more than a censure", is in no position to contend in this Court that his suspension for a two-year period, instead of a censure, violated his constitutional rights.

2.

Petitioner, in his petition for the first time claims that his production of financial records and case files constituted an illegal search and seizure under the Fourth Amendment. No such claim was made at the hearings in the disciplinary proceedings or before the Appellate Division or the Court of Appeals. This is conceded in the petition (p. 11). Accordingly this present assertion of violation of Fourth Amendment rights was never considered by the Appellate Division or reviewed by the Court of Appeals.

Petitioner's financial records described in a subpoena duces tecum were willingly produced. Nowhere in the transcript of the petitioner's testimony at the preliminary investigation (Exh. 16) does there appear any claim either by petitioner or his counsel that such production of his records

constituted an illegal search and seizure. At the hearings in the disciplinary proceedings petitioner made no objection to the introduction into evidence of records he had theretofore turned over to Inquiry counsel. In fact, at the disciplinary hearings, petitioner produced an additional case file and specifically stated that he was willing to answer any questions concerning it (R. 279).

3.

The petition asserts that with respect to the disciplinary proceedings (p. 4) "virtually all the proof was derived from petitioner's compelled disclosures and production". This is contrary to the fact. Proof of some of the serious charges of misconduct by petitioner found by the Appellate Division, rested on neither petitioner's testimony nor on any records he had produced.

Charge 1—that petitioner's compromised infants' negligence claims without Court approval, a violation of New York Statute (sec. 474 Judiciary Law; Art. 80 Civil Practice Act; Rule 294, Rules of Civil Practice) (A5-A10) was proved by incontrovertible documentary evidence. Petitioner's statements of retainer filed with the Appellate Division and his correspondence obtained from insurance carrier files disclosed his contingent fee retention on behalf of infant claimants (Exhs. 11-15, 42, 44, 45, 46, 49). From insurance carrier records there were obtained parents' releases accepted by the carriers in lieu of Court orders approving the settlements and insurance carrier drafts payable to petitioner and the parents of the infant claimants (Exhs. 1c, 1d, 1e, 3a, 3b, 3c, 47, 48). At the disciplinary proceedings petitioner admitted that he had compromised infants negligence claims without Court approval (R. 835-838). Evasion

of judicial scrutiny of settlements made in behalf of infants has been repeatedly deemed "grievous misconduct" (*Matter of Shufer*, 12 A D 2d 208, 214; *Matter of Gladstone*, 16 A D 2d 512, 515; *Matter of Feldman*, 17 A D 2d 553, 558).

Charge 7—was that petitioner had knowingly caused a complaint in an action to be prepared, verified and served, in which it was falsely alleged that one of the plaintiffs had been appointed guardian ad litem for two infant plaintiffs. This was clearly proved by evidence obtained from insurance carrier files, by certification of Court records, and by testimony of an insurance attorney and of petitioner's client (Exh. 1a, 2, 9, 10; R. 11-16, 46). Petitioner, when testifying as his own witness, admitted that the said allegations in the complaint he had prepared and served were untrue. (R. 844-845).

Charge 10—was that petitioner, in reckless disregard of the pertinent rule of the Appellate Division (A3-A4), filed numerous statements of retainer in contingent fee negligence matters which misstated his agreed terms of compensation. This charge was supported by statements of retainer filed by petitioner with the Appellate Division (Exhs. 11-15) and by Exh. 130, a tabulation received in evidence on petitioner's stipulation showing that in 52 instances, petitioner had retained contingent fees in excess of the percentage set forth in his statements of retainer. Petitioner testified at the disciplinary hearings that the fees he retained were in excess of the percentage set forth in the statements of retainer and conceded that the said statements were erroneous to that extent (R. 599-600, 854-855). The giving of false information in statements of retainer is serious misconduct (*Matter*

of Fata, 22 A D 2d 116, leave to appeal den., 15 NY 2d 487, cert. den. 382 U.S. 917).

Charge 22—that petitioner did not file statements in contingent fee negligence matters as required by the Special Rules (A3-A4). This was disclosed in the preliminary investigation by simple comparison of insurance carrier records with statements of retainer that petitioner had filed with the Appellate Division. In testifying at the disciplinary hearings in his own defense, petitioner admitted the truth of this charge (R. 1040-1041).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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